Petition

83-680

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

TOMMY M. MOTLAGH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Jacob A. Stein
Robert F. Muse
Stein, Mitchell & Mezines
1800 M Street, N.W.
Washington, D.C. 20036
(202) 737-7777

Attorneys for Petitioner -
Tommy Motlagh

QUESTIONS PRESENTED

1. WHETHER THE A CRIMINAL DEFENDANT'S CONSITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A JURY TRIAL ARE VIOLATED WHEN HE IS TRIED BEFORE ONE JURY AND HIS ALLEGED CO-CONSPIRATORS ARE SIMULTANEOUSLY TRIED BEFORE ANOTHER JURY AT A JOINT TRIAL.

2. WHETHER THE DISTRICT COURT'S REQUIREMENT THAT A DEFENDANT PROVE PREJUDICE BY REASON OF HIS CRIMINAL TRIAL INVOLVING TWO JURIES IS AN UNCONSTITUTIONAL AND IMPERMISSIBLE BURDEN.

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**PETITION FOR WRIT OF CERTIORARI
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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Tommy M. Motlagh prays that a Writ of Certioria issue to review the Judgment entered in this case on August 19, 1983, by the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. __1__, pp. ___, infra) was filed on August 19, 1983, and is not yet reported. The opinion of the United States District Court for the District of Columbia (Pet. App. ____, pp. ____, infra), filed March 17, 1982, is reported as United States v. Lewis, 537 F. Supp. 151 (D.D.C. 1982).

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was issued on August 19, 1983. The jurisdiction of this Court rests on 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Fifth Amendement

No person shall...be deprived of life, liberty, or property, without due process of law....

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,...

STATEMENT OF THE CASE

This case raises an issue of first impression for the Court, namely, whether the Constitution permits the criminal trial of the co-defendants simultaneously before two separate juries at a joint trial.

The petitioner, Tommy M. Motlagh, and two other individuals, Robert C. Lewis and James L. Boardley, were joined as co-defendants in an indictment which charged various conspiratorial and substantive offenses charged was that Motlagh bribed and conspired to bribe Boardley and Lewis, both of them were officials with the District of Columbia Alcoholic Beverage Control Board.

Shortly before trial, the government indicated that it intended to introduce the

testimony of Nasser Zolfghari, a former friend of Motlagh's. Part of Zolfghari's testimony included statements by him that amounted to admissions by Motlagh. On a severance motion by the co-defendants, the District Court ruled that Zolfghari's testimony could be admitted into evidence against Motlagh, but could not be admitted against the co-defendants, Lewis and Boardley. Such testimony, the court ruled, amounted to admissions of a defendant which inculpate his co-defendant. Accordingly, under the doctrine of Bruton v. United States, 391 U.S. 123 (1968), such statements were inadmissible against the co-defendants.

Rather than granting the usual remedy of severance, the trial judge ruled that he would hold a joint trial before two juries. As the trial judge explained, "[t]hough this is an innovative technique, the Court finds the use of the two juries to be the best way to expedite this case consistent with the ends of justice." United States v. Lewis, 537 F. Supp. 151, 155 (D.D.C.

1982). One jury would hear the case against Lewis and Boardley, in a setting where Zolfghari's testimony would not be presented to them. The second jury would hear the case against Motlagh, in a setting where Zolfghari's testimony would be presented.

Counsel for the government, as well as the defense, immediately objected to the dual jury proposal by the court. The government, in its motion for reconsideration of this multiple jury order, noted:

> For what may be the first, and will probably be the last, time in the lengthening history of this increasingly complicated case, we are reluctantly */ constrainedto agreewith the defendants that the two jury procedure is inappropriate in this case. Therefore, if the Court adheres to its ruling on the **Bruton** motion--and we would strenously urge the Court to consider that ruling--we join in the request that the Court reconsider and rescind its order to try the severed cases simultaneously before separate juries.

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*/ We are reluctant because we believe that the two jury procedure has much merit and could be an innovative, creative and economic solution to the **Bruton** problem in an appropriate case. Unfortunately, this is not the case.

The trial court denied the motion for reconsideration and accordingly two juries were impanelled.

The trial court also ordered that the Boardley-Lewis jury be sequestered because of the likelihood that it might be adversely affected by media coverage of the Zolfghari admissions. The Motlagh jury was not sequestered. The trial lasted eight days and was fraught with numerous issues of a sophisticated and difficult nature. For example, the jury was confronted with numerous transcripts of conversations surreptitiously taped by the government; the weight to be accorded co-conspirators' statements; the meaning of the theretofore untested District of Columbia conspiracy statute; and a very complex set of facts supporting the conspiracy. As the trial judge noted, the case was a "complex criminal matter." United States v. Lewis, supra, 537 F. Supp. at 152.

Following the presentation of evidence and instructions, the two juries deliberated. Motlagh

was acquitted of all counts except Count 5, which charged a violation of the local District of Columbia conspiracy statute. The co-defendants were convicted of substantive offenses as well as a federal conspiracy charge. However, they were acquitted of Count 5. Accordingly, Motlagh was left in the position of having been convicted of a conspiracy of which his only known co-conspirators were acquitted.

On appeal, the Circuit Court noted that it was dealing with an issue of first impression in the District of Columbia Circuit, though three federal circuits had upheld convictions rendered by dual juries at joint trials. United States v. Lewis, slip op. at 6 (D.C. Cir. August 19, 1983). It noted further that the state courts had generally been critical of the dual jury procedure. Id. It acknowledged the "warnings eloquently voiced by various state courts," but "accept[ed] the dual jury procedure so long as it comports with the ethos of due process commanded by our stringent rules of criminal justice." Id.

at 7. In the absence of specific prejudice to someone's defense at trial, the Circuit Court ruled, the verdice would not be disturbed. Id. at 8. Accordingly, Motlagh's conviction was affirmed.

REASONS FOR GRANTING THE WRIT

This case raises important substantive and procedural issues that relate to the integrity of the administration of the federal criminal law, and which are subject to apparent disagreement among federal courts.

The Court of Appeals for the District of Columbia and the three other circuits that have examined the propriety of the dual jury procedure have done so in a very tentative manner. All courts - state and federal - which have considered the issue have cautioned against the use of the multiple jury system, but none has disturbed a verdict because no defendant had demonstrated actual prejudice. This approach to the problem has placed the accused in an untenable position because the very nature of the problem does not

permit prejudice to be identified. It is an impossible burden on the defendant to identify prejudice when the prejudice lies with the particular subjective perception of the jurors.

Moreover, the Circuits appear to be in conflict regarding the type of case in which the two jury procedure can be utilized. Prior to this case, two juries had been permitted only in relatively uncomplicated criminal cases. This appears to be the first instance where a federal court has sanctioned the system in a complicated and difficult trial.

The criticism of two jury systems is well-founded. This case raises the issue to consitutional dimensions, for a defendant's rights to due process of law and an impartial jury are compromised when, in a complicated case, the jurors are in a multiple jury setting. Traditional notions of how a trial is conducted are dangerously affected by this novel alteration of the criminal justice process. The only justification for this process, i.e., conservation

of judicial resources, is a factor which cannot take precedence over the accused's interest in a fair trial.

This Court should examine this novel and significant alteration of the usual method by which criminal trials have been conducted. The Circuit Court's decision opens the door to an increase in the use of multiple jury proceedings. Such an increase is unwarranted and at odds with the essential goals of the criminal justice system. Conservation of judicial resources is not an appropriate justification for the process. Considerable problems in the administration of criminal justice in both the state and federal courts will follow unless this Court gives guidance on the constitutionally permissible standards that must be met if and when multiple juries are utilized.

I. Petitioner Motlagh's Constitutional Rights Were Violated by the Dual Jury Trial.

The use of the multiple jury procedure is a recent development in the criminal law. The

process has been acknowledged as unusual and fraught with problems. This Court has not previously examined the issue of the constitutionality of such a procedure.

Each court that has considered the propriety of a dual jury trial, although approving use of such trials, has expressed concern about the effect of such a trial on the rights of the accused. In Scarborough v. State, 50 Md. App. 276, 437 A.2d 672, 674 (1981), the Maryland Court observed:

> The [two jury] procedure is precarious because all the risks inherent in the traditional jury system become two-fold; as a result, courts which have sanctioned its use have done so hesitantly....

The court noted that while appellate courts generally have not found reversible error in the utilization of such procedure, they "generally condemn its use." Id. at 675.

In United States v. Sidman, 470 F.2d 1158 (9th Cir. 1972), the Ninth Circuit in the first federal court statement on the issue of dual juries, explained that the jurors had been

instructed that the novel approach was an "experiment." Since Sidman, two other Circuit Courts have considered the two jury "experiment." See United States v. Hayes, 676 F.2d 1359 (11th Cir. 1982); United States v. Rimar, 558 F.2d 1271 (6th Cir. 1977), cert. denied, 435 U.S. 922 (1978). These courts have been uniform in their concerns about the procedure. For example, the Sixth Circuit noted the confusion engendered by separate juries:

> "The primary concern of this court after receiving the briefs and oral arguments of the parties, was whether the unusual procedure implemented in the district court of simultaneous prosecutions before two juries and the judge created an atmosphere so confusing as to deprive these appellants of a fair trial. A thorough review of the record has revealed certain instances of confusion, some cited by the appellants, some not. Several of such instances were reflected by mis-statements of the judge or defense counsel in referring to the attorneys or their clients by the wrong names, or confusing momentarily which jury was sitting in which case. Many of these confusing moments took place out of the presence of the juries. However, nowhere in the record do we find any continuing confusion, so pervasive as to render the trial unfair. The trial judge seemed very much aware of the potential for error inherent in the procedure and he moved cautiously in areas where the rights of

particular defendants were or could have been involved. Hence the trial took somewhat longer than the nature of the charges might suggest was necessary. In instances where mis-statements occurred, the district judge promptly corrected himself or the attorney involved and instructed the jury accordingly. As the Supreme Court has held: "'A defendant is entitled to a fair trial but not a perfect one.'...It is not unreasonable to conclude that in many cases the jury can and will follow the trial judge's instructions to disregard such [improperly submitted] information."

United States v. Rimar, 558 F.2d at 1273.

Even if a dual jury trial is not Constitutionally infirm in an absolute sense (which petitioner contends it is), it is unconstitutional when used in a trial as lengthy and complex as this. Basic due process considerations guaranteed by the Fourteenth Amendement are jeopardized in a complex trial where two juries are employed. Here, the jury that convicted defendant Motlagh under the local conspiracy charge considered evidence which their companion jury did not see. They saw a portion of direct testimony by Mr. Zolfghari from which the other jury was excluded. They saw the cross examination by counsel for defendant Motlagh from

which the other jury was excluded. They saw witnesses called to impeach Mr. Zolfghari which the other jury did not see.

Whether or not defendant Motlagh's jury was confused by the multiple entrances and exits by the other jury, the effect on defendant Motlagh was prejudicial. If they were confused, one cannot say that the verdict of conviction of defendant Motlagh on the local conspiracy charge was intelligently rendered by the jury. If they were not confused, the situation is even worse for defendant Motlagh. If the jury in fact realized why the other jury was wandering in and out of the courtroom, it is quite possible that they concluded that if the evidence the other jury could not hear was so prejudicial to those defendants, it must be sufficiently important to lead to a finding of guilty.

Because of such problems in complex areas, one of the first state courts to consider dual jury trials was careful to state that they may only be used in uncomplicated matters:

> We conclude that the multiple jury procedure utilized in the instant case can involve substantial risks of prejudice to a defendant's right to a fair trial....[T]here are too many opportunities for reversible error to take place. We do not recommend it. If it is to be used at all, it should be in relatively uncomplicated situations which will not require the excessive moving of juries in and out of the courtroom and where the physical separation of the jury during the entire trial proceedings can be ensured. In short, a trial court should carefully weigh the risks involved before attempting to utilize the multiple jury proceedings.

State v. Corsi, 86 N.J. 172, 430 A.2d 210 (1981) (emphasis supplied).

The government is sure to argue that use of dual jury trials in lengthy and complex cases is especially appropriate because it is in such cases that judicial efficiency, one objective of the dual jury trial, is most important. However, that is the situation which poses the greatest threat to the rights of the accused, the preeminent consideration in any criminal trial. As the United States Court of Appeals for the Sixth Circuit has observed:

> [J]ustice, not judicial economy is the first principle of our legal system. And under no circumstances may well-intentioned efforts to

> conserve judicial time be permitted to prejudice the fundamental right of a criminal Defendant to a fair trial.

United States v. Crane, 499 F.2d 1385 (6th Cir. 1974); see also United States v. Hayes, 676 F.2d 1359, 1366 (11th Cir. 1982).

The dual jury trial employed in this case denied defendant Motlagh the due process of law to which he was entitled. The procedure is unconstitutional, especially when applied to a trial as lengthy and complex as this, and the Court should take this opportunity to speak to this issue.

II. The Court Impermissibly Shifted the Burden of Showing Prejudice to the Accused.

In its opinion, the Court of Appeals required Motlagh to show the specific prejudice he suffered as a result of the dual jury trial. United States v. Lewis, slip op. at 8. It ruled that since he did not show such prejudice, use of the unusual trial procedure was appropriate. This ruling violated defendant Motlagh's right to due process.

In a criminal matter, the burden of proof and persuasion rests with the government given the presumption that the accused is innocent until proven guilty. Yet, the Court of Appeals required the accused in this case to carry the burden of showing prejudice arising from the use of the dual jury. This is especially disingenuous since such a showing could only truly be made by examining the deliberate process in which the jury engaged, something that an accused cannot do.

It is an impermissible burden to place on the accused, for the prejudice oftentimes lies within the subjective perception of the jurors. All courts that have considered the issue of two juries talk of the need to establish prejudice. That, however, is a hollow sounding instruction, for the accused can <u>never</u> meet this burden.*/

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*/ Defendant Motlagh was convicted of the local conspiracy charge by his jury while his co-defendants, the only persons with whom he could have conspired, were acquitted of the charge by their jury. This outcome gives rise to two

inferences, either of which raises a prima facie presumption of prejudice which the Court of Appeals should have used to find the procedure improper:

1. The jury was so confused that it did not render an intelligent verdict; or

2. The jury, watching the multiple entrances and exits of its companion jury, concluded that if the evidence was so prejudicial to Motlagh's co-defendants it must be sufficient to warrant Motlagh's conviction.

The prosecution should have been required to rebut this presumption before the verdict against defendant Motlagh was upheld.

CONCLUSION

The only justification in ordering a dual jury in this case was the time and expense that woul dhave been involved in two trials. It is laudable that the court so carefully considered this factor in ruling. However, Motlagh's right to a fair trial should not have been sacrificed to judicial efficiency. The quest for judicial efficiency, in this case, led to a violation of defendant Motlagh's constitutional rights. This Court should take this opportunity to consider the constitutionality of the dual jury trial, especially in a lengthy and complex case.

Respectfully submitted,

Jacob A. Stein
Robert F. Muse
STEIN, MITCHELL & MEZINES
1800 M Street, N.W.
Washington, D.C. 20036
(202) 737-7777

Attorneys for Petitioner
Tommy M. Motlagh

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1703

UNITED STATES OF AMERICA

v.

ROBERT C. LEWIS, APPELLANT

No. 82-1713

UNITED STATES OF AMERICA

v.

TOMMY M. MOTLAGH, APPELLANT

No. 82-1732

UNITED STATES OF AMERICA

v.

JAMES BOARDLEY, APPELLANT

Appeals from the United States District Court
for the District of Columbia
(D.C. Criminal No. 81-00436)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Argued June 7, 1983

Decided August 19, 1983

Robert P. Watkins, with whom *F. Lane Heard, III* was on the brief, for appellant in No. 82-1703.

Robert F. Muse, with whom *Jacob A. Stein* was on the brief, for appellant in No. 82-1713.

R. Kenneth Mundy was on the brief for appellant in No. 82-1732. *James E. Boardley* entered an appearance *pro se* in No. 82-1732.

Joseph Michael Hannon, Jr., Assistant United States Attorney, with whom *Stanley S. Harris*, United States Attorney, and *Michael W. Farrell*, *Richard L. Beizer*, and *David W. Stanley*, Assistant United States Attorneys, were on the brief, for appellee. *John A. Terry*, Assistant United States Attorney at the time the brief was filed, entered an appearance for appellee.

Before ROBINSON, *Chief Judge*, and WRIGHT and SCALIA, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: This case involves appeals from convictions rendered after jury trials. Appellants Robert C. Lewis and James E. Boardley were found guilty of conspiring to commit bribery, 18 U.S.C. § 371, and of soliciting bribery, 18 U.S.C. § 201(c). Appellant Tommy Motlagh was found guilty of conspiring to defraud the District of Columbia, 22 D.C. Code § 105a(a). Among the arguments appellants pose challenging their convictions is their assertion that the trial court committed reversible error by trying their severed cases simultaneously before two juries.

We have considered and rejected all of the appellants' arguments and affirm their convictions.

I. Factual Background

The offenses giving rise to this case occurred between December 1979 and February 1981. During that period appellant Lewis was the Director of the District of Columbia Department of Licenses, Investigations, and Inspections and the Chairman of the District of Columbia Alcoholic Beverage Control Board (ABC). Appellant Boardley was Staff Director of the ABC, having been appointed to that position by Lewis. Appellant Motlagh owned a restaurant-bar in the District.

Lewis and Boardley used their official positions in an attempt to pressure Hechinger Mall, a large shopping center then under construction, into providing Motlagh with a lease for a liquor store. To obtain the assistance of Lewis and Boardley, Motlagh agreed to provide them with a secret interest in the profits of the liquor store. What unravelled this scheme was the probity of Daniel Russell, the Hechinger official Lewis and Boardley relied upon to obtain a lease for the liquor store. Russell revealed their plan to federal agents and aided these agents in prosecuting the appellants.

Lewis and Boardley first approached Russell in December 1980 after they had urged other officials of the Hechinger Mall to provide their friend Tommy Motlagh with a lease for a liquor store. Lewis and Boardley told Russell that Motlagh should have the opportunity to purchase the lease because he was a "minority businessman." In response, the Hechinger Mall interrupted negotiations with a white businessman with whom it had discussed leasing arrangements for a liquor store and made plans to begin negotiations with Motlagh. When Russell met Motlagh, however, he discovered that Motlagh was not a black "minority" as he had been led to believe, but rather an Iranian.

After that meeting, Russell told his colleagues at Hechinger's to renew negotiations with the white businessman since Motlagh was not a minority investor. The next time he spoke with Boardley, Russell told him that

Hechinger's felt a moral commitment to continue negotiations with the original applicant for the liquor store lease. Boardley then warned Russell that this prospective tenant would have difficulty receiving ABC Board approval. Boardley also told Russell that his friend Robert Lewis, as Director of the Department of Inspections, Investigations and Licenses, was responsible for the issuance of all the construction permits that were required to complete Hechinger Mall. Finally Boardley offered Russell an interest in the liquor store if he obtained a lease for it from Hechinger's.

Russell informed his superiors at Hechinger's of his conversation with Boardley. They decided to take this information to federal prosecutors. The prosecutors prevailed upon Russell to pretend to go along with Boardley's scheme. The prosecutors also arranged for an FBI agent to serve as Russell's front man in his subsequent negotiations with Boardley and Lewis. The FBI agent posed as "Wade McKeever."

Over the course of a year, Russell and Wade McKeever met with Boardley and Lewis several times and spoke with them often on the phone. Many of these interactions were tape-recorded. Occasionally, Russell or McKeever also spoke on the phone with Motlagh. These conversations, too, were recorded. What these recordings revealed was the making of plans whereby Russell, Lewis and Boardley would each receive secret interests in the Hechinger Mall liquor store that would be owned by Tommy Motlagh. Russell would receive a secret interest in return for obtaining a lease for the liquor store from Hechinger's. Lewis and Boardley would receive an interest in the profits in return for obtaining Russell's assistance and for securing a liquor license for Motlagh. At the same time that Lewis was putting pressure on Russell to provide Motlagh with a lease in the Hechinger Mall, he was also using his public position to arrange for Motlagh to buy a Class A retail liquor license at a greatly reduced price.

On November 9, 1981, a grand jury issued a multi-count indictment against the appellants. Count 1 charged all three with conspiring to commit bribery, 18 U.S.C. § 371. Count 2 charged Motlagh with offering a bribe to Lewis and Boardley, 18 U.S.C. § 201(b). Count 3 charged Lewis and Boardley with soliciting a bribe from Motlagh, 18 U.S.C. § 201(c). Count 4 charged Lewis and Boardley with soliciting a bribe from Hechinger Mall, 18 U.S.C. § 201(c). Count 5 charged Motlagh with conspiring to defraud the District of Columbia of the faithful services of Lewis and Boardley, 22 D.C. Code § 105a(a).

After an eight-day trial, Lewis and Boardley were convicted under Counts 1 and 4; Motlagh was convicted under Count 5. Lewis and Boardley were each sentenced to one to four years' imprisonment on each count, with all but 180 days suspended in favor of probation on the condition that each pay a $5,000 fine on each count. Motlagh was sentenced to one to four years' imprisonment, with all but 180 days suspended, and was placed on probation on the condition that he perform one hundred hours of community service and pay a fine of $5,000.

II. Issues

A. *The Dual Jury Procedure*

The central issue of these appeals is whether the appellants are entitled to reversals of their convictions based upon the district court's decision to try their cases simultaneously before two juries. The issue arose because the prosecution sought to introduce the testimony of Nasser Zolfaghari, a former friend of Motlagh's. Zolfaghari's testimony consisted of two sets of statements. First, Zolfaghari stated that on two occasions he had observed the three appellants together at restaurants. Second, Zolfaghari stated that Motlagh had told him that Lewis and Boardley were secret partners in the liquor store and that they had "messed up" in their transaction with Russell. Admitting the first statement into evidence posed

no difficulty. But with respect to the second statement, the district court ruled that while it could be admitted into evidence against Motlagh, it could not be admitted into evidence against Motlagh's co-defendants Lewis and Boardley. The testimony could not be admitted against them because under *Bruton v. United States*, 391 U.S. 123 (1968) admissions of a defendant which inculpate his co-defendant are inadmissible against that co-defendant.

The district court refused, however, to sever the defendants and try them severally. Instead, the court determined that it would hold a joint trial before two juries. One jury would hear the case against Lewis and Boardley. That jury would be prevented from hearing Zolfaghari's testimony concerning Motlagh's statements about Lewis and Boardley. A second jury would hear the case against Motlagh including all of Zolfaghari's testimony. *See United States v. Lewis*, 537 F. Supp. 151 (D.D.C. 1982). The district court recognized that this dual jury procedure represented "an innovative technique," but found the use of it "to be the best way to expedite this case consistent with the ends of justice." *Id.* at 155. Counsel for the prosecution as well as for the defense initially objected to the dual jury and petitioned the court to reconsider its plan. These petitions, however, were rejected. Now appellants renew their objection to the dual jury procedure and assert that it robbed them of a fair trial.

The acceptability of dual juries has not been tested in this circuit. Three other circuits, however, have upheld convictions rendered by dual juries at joint trials. *See United States v. Hayes*, 676 F.2d 1359 (11th Cir. 1982); *United States v. Rimar*, 558 F.2d 1271 (8th Cir. 1977), *cert. denied*, 435 U.S. 922 (1978); *United States v. Sidman*, 470 F.2d 1158 (9th Cir. 1972), *cert. denied*, 409 U.S. 1127 (1973). State courts have generally been more critical of the dual jury procedure then have their federal counterparts. *See, e.g., State v. Corsi*, 86 N.J. 172, 430 A.2d 210 (1981) (the multiple jury procedure "can in-

volve substantial risks of prejudice to a defendant's right to a fair trial. * * * [T]here are too many opportunities for reversible error to take place. We do not recommend it. If it is to be used at all, it should be used in relatively uncomplicated situations"); *Scarborough v. State*, 50 Md. App. 276, 437 A.2d 672 (1981) (the multiple jury system * * * is precarious because all the risks inherent in the traditional jury system become two-fold; as a result, courts which have sanctioned its use have done so hesitantly."). But neither a state appellate court nor any federal court of appeals has yet reversed a conviction based upon the use of dual juries. In every case courts have inquired as to whether the appellant could point to evidence indicating specific prejudice to his defense stemming from the dual jury procedure. In the absence of such evidence, courts have let stand the convictions of dual juries.

We follow the lead taken by our sister circuits while acknowledging the warnings eloquently voiced by various state courts. We accept the dual jury procedure so long as it comports with the ethos of due process commanded by our stringent rules of criminal justice. In evaluating the application of the dual jury procedure in particular cases our focus too is upon whether there exists evidence indicating that the dual jury caused specific prejudice to someone's defense at trial.

Appellants attack the district court's decision to use a dual jury in this case. They deride the procedure as "novel," note that it has been criticized by some courts, emphasize that initially the procedure was strongly opposed by the prosecution as well as the defense and assert that using the dual jury was especially ill-advised here because of the complicated nature of the underlying charges. These objections betray a misunderstanding of this court's task. This court's task is not to determine whether the district court made the optimal decision on the eve of trial when it decided to impanel two juries

rather than accept the added drain on judicial resources that severing the defendant's cases would have entailed. Rather this court's task is to determine whether the procedure imposed by the district court comports with the basic norm of due process. The basic fairness of the dual jury procedure can only be properly evaluated in light of the trial itself by determining whether any evidence indicates that the procedure specifically prejudiced a litigant's defense.

Neither Boardley nor Motlagh even attempt to show that they suffered specific prejudice on account of the dual jury procedure. Boardley identifies the asserted harm to which he objects in only general terms: "The forms of the verdicts returned by the two juries are the best testament of the problems that result from dual juries." Brief for appellant Boardley at 10. Appellant Motlagh concedes that he is unable to produce evidence indicating specific prejudice resulting from the dual jury. He complains, however, that "[i]t is virtually impossible to identify any specific prejudice because the prejudice is to be found in the subjective response of the jury." Brief for appellant Motlagh at 44. Motlagh contends that the fact that one jury was sequestered while one was not heightened the risk that the juries would be affected in a manner unfairly detrimental to his defense. "Who can now say" he asks, "that the unsequestered jurors were not speculating on this unusual circumstance where jurors on the other side of the room were being escorted in and out of the room by a marshall?" *Id.* Such idle speculation, however, is not enough to overturn a jury's verdict; as noted above, such extraordinary relief requires evidence of specific prejudice. Furthermore, the district court's sequestration of one of the juries is more indicative of fairness than prejudice. Upon appellant Lewis's motion, the court sequestered the Lewis-Boardley jury in order to lessen the possibility that its members would inadvertently hear about the additional testimony being

heard by the Motlagh jury. Complying with Motlagh's request, the district court did not require the sequestration of the Motlagh jury.

Only appellant Lewis attempts to show that his defense was specifically prejudiced by the dual jury procedure. According to Lewis, the prejudice stems from the fact that the Lewis-Boardley jury was not allowed to hear a part of the cross-examination of Zolfaghari by counsel for Motlagh—cross examination that challenged Zolfaghari's credibility—nor the testimony of severed witnesses whose testimony impugned Zolfaghari's honesty. The Lewis-Boardley and Motlagh juries were both exposed to Zolfaghari's testimony that he had seen Lewis, Boardley and Motlagh together in restaurants on two occasions. Counsel for Lewis and Boardley were given an opportunity to cross-examine Zolfaghari with respect to this testimony. They declined. Following a recess, only the Motlagh jury was allowed to hear Zolfaghari's testimony regarding what Motlagh had said to him about Lewis and Boardley. Similarly, only the Motlagh jury was allowed to hear Motlagh's counsel cross-examine Zolfaghari and the witnesses Motlagh's counsel put on the stand to impugn Zolfaghari's testimony. Lewis claims that he was prejudiced in that the jury considering his guilt or innocence was barred from hearing testimony that undermined Zolfaghari's credibility. More specifically, Lewis claims that a discrepancy exists between his testimony and that of Zolfaghari. Zolfaghari placed Lewis and Motlagh together at a period two months before Lewis testified to meeting Motlagh for the first time. Lewis now claims that this discrepancy was significant and that the dual jury procedure, intended to insulate the Lewis-Boardley jury from inadmissible evidence, had the effect of barring the jury from evidence that would have shed light upon the proper evaluation of this discrepancy.

Appellant Lewis's claim that the dual jury procedure caused him specific prejudice warranting this court's nullification of his conviction is unavailing. First, before Zolfaghari was scheduled to testify for the government the trial court asked counsel how they wished to handle the difficulty that would be caused by his testimony. Appellant Lewis makes no mention of any objection he had at that time regarding the procedure used to present Zolfaghari's testimony to the two juries. Second, Appellant Lewis now contends that Zolfaghari's credibility was a central issue in the case. Yet at trial Lewis declined even to cross-examine him. Third, Appellant Lewis has presented no persuasive reason why, during the presentation of his defense, he did not call before the Lewis-Boardley jury the witnesses that impugned Zolfaghari's honesty before the Motlagh jury. Finally, even if it were true that an error had been committed in preventing the Lewis-Boardley jury from hearing the testimony against Zolfaghari, Appellant Lewis's argument that the effect of this error constituted significant prejudice is wholly lacking in credibility given the factual background of this case.

B. *The Count 1 Conviction*

Appellants Lewis and Boardley challenge their conviction under Count 1, conspiring to commit bribery, contending (1) that their conviction under Count 1 is impermissibly inconsistent with their acquittal under Count 5, conspiring to defraud the District of Columbia, and (2) that their conviction under Count 1 is impermissibly inconsistent with their co-defendant Motlagh's acquittal under that count. These challenges need not long detain us.

First, with respect to the asserted inconsistency between conviction on Count 1 and acquittal on Count 5, case law establishes that inconsistency in jury verdicts on multiple counts in a single indictment is not sufficient to overturn

an otherwise valid conviction. *See, e.g., Dunn v. United States*, 284 U.S. 390, 393 (1932); *Hamling v. United States*, 418 U.S. 87, 101 (1973); *United States v. Fox*, 433 F.2d 1235, 1238 (D.C. Cir. 1970) ("[H]owever much the jury's conclusion may tax the legally trained penchant for consistency, the law is clear that inconsistent verdicts among the varied charges of a multi-count indictment are not self-vitiating."). Second, it is clear that Motlagh's acquittal on Count 1 alongside Lewis's and Boardley's convictions creates no real inconsistency since Motlagh was not an essential party to the bribery conspiracy. The juries could permissibly have found that Lewis and Boardley conspired only between themselves to solicit a bribe from Motlagh. Hence, the mere fact that the Motlagh jury acquitted Motlagh of culpability in no way undermines the verdict that the Lewis and Boardley jury rendered against those two appellants.

C. *The Count 4 Conviction*

Appellants Lewis and Boardley challenge their conviction under Count 4, asserting that that portion of the indictment fails to state an offense. Count 4 charged Lewis and Boardley with violating 18 U.S.C. § 201(c). More specifically, Count 4 alleged that the appellants, as public officials, solicited from Hechinger's something of value for themselves and Tommy Motlagh—i.e., a lease at the Hechinger Mall—in return for using their official positions to transfer a liquor license to be owned by Motlagh to a location in the Hechinger Mall. According to Lewis and Boardley, Count 4 fails to state an offense because it does not describe the explicit *quid pro quo* that Section 201(c) requires. Appellants maintain that while Count 4 alleges that they solicited a benefit—a lease for a store in which they had a secret interest—Count 4 fails to allege that Hechinger Mall was to receive anything of value in return. Without such reciprocity of benefit, ap-

pellants contend that Count 4 fails to state a violation of Section 201(c).

This argument is without merit even if we accept the proposition (foreign to contract law) that a bargained-for benefit to a third party is not a "*quid pro quo*" to the person who seeks it. Assuming, *arguendo*, the validity of appellants' construction of Section 201(c), it is clear that, contrary to their assertions, Count 4 does describe a *quid pro quo* between Lewis and Boardley on the one hand and the Hechinger Mall on the other. Appellants claim that Count 4 alleges in return for their corrupt actions that a benefit was to be conferred not on Hechinger's but only upon Tommy Motlagh. Count 4 of the indictment reads, however, that Lewis and Boardley did "ask, demand, solicit and seek from Hechinger's something of value for themselves, Tommy M. Motlagh, and a corporation to be formed by him . . . in return for being influenced in the performance of official acts in connection with the approval [and] the transfer of a liquor license to Tommy M. Motlagh *and the transfer of such license to a location in the Hechinger Mall.*" (Emphasis added). While Motlagh is the beneficiary most saliently outlined by Count 4, it also described Hechinger's as a vicarious beneficiary of appellant's corrupt scheme inasmuch as Count 4 states that Lewis and Boardley were to effect the transfer of a liquor license to a location in the Hechinger Mall. Plainly such a transfer would inure to Hechinger's benefit if for no other reason than that it would enhance the profitability of one of Hechinger's tenants and engender whatever other benefits liquor stores bring to shopping malls.

D. *The Count 5 Conviction*

Appellant Motlagh challenges his conviction under Count 5, conspiring to defraud the District of Columbia of the faithful services of its officials. He claims that his conviction is invalid: (1) on the basis of its incon-

sistency with his co-defendants' acquittal; (2) because Count 5 fails to state an offense; and (3) because Count 5 is multiplicitous with respect to Count 1. These arguments are unpersuasive.

First, Motlagh argues that the trial court erred in failing to enter judgment of acquittal where Motlagh was the only defendant convicted of the D.C. conspiracy charge and the alleged co-conspirators were acquitted. The traditional rule is that the conviction of a defendant in a conspiracy prosecution must be vacated if all other alleged conspirators are acquitted in a joint trial. Motlagh contends that the District Court was thus obligated to void his conviction since he was convicted at a joint trial with his co-defendants while Lewis and Boardley were acquitted.

The difficulty with that argument is that this case does not fit within the traditional rule. Although Motlagh was convicted in a joint trial, he was convicted by a jury separate from that which acquitted his co-defendants. The cases he cites which illustrate the traditional rule are cases in which a *single* jury hearing the *same* evidence acquitted all but one alleged co-conspirator. Because a person cannot conspire with only himself, such convictions were voided as irrational. In this case, however, Motlagh and his co-defendants were tried by *multiple* juries which heard *different* evidence with respect to each set of defendants. In these circumstances "[t]he fact that a different jury—hearing less evidence, evaluating the common evidence from a different perspective, and perhaps acting on sympathy, caprice or compromise—did not find Lewis and Boardley guilty • • • should not entitle Motlagh to escape from a valid conviction." Government's Brief 71.

Second, Motlagh argues that his conviction is erroneous because Count 5 does not state an offense. Count 5 charged Motlagh (along with Lewis and Boardley) with conspiring to defraud the District of Columbia of its

lawful governmental functions including its right to have the disinterested official services of Lewis and Boardley, and its right to have its business conducted honestly. Motlagh contends that 22 D.C. Code § 105a(a), under which he was charged in Count 5, should be limited to fraud on the government involving money or property and not be read to reach fraud which impairs governmental functions. Appellant's contention, if adopted, would mean that Count 5 does not state an offense since it only alleges conspiracy with respect to fraud involving governmental functions.

To support his interpretation of Sections 105a(a), Motlagh asserts that that Section is based on the New York Penal Code which is limited to fraud involving money or property. This assertion, however, is incorrect. The only part of the D.C. law that is based upon the New York Code is that part pertaining to venue and jurisdiction of a conspiracy. Congress needed to borrow this portion of the New York law because of the necessity of greater specificity in a statute applicable to a geographically limited area within the United States. The substantive portion of the D.C. Code provision is modeled after its federal counterpart, 18 U.S.C. § 371. Though the legislative history does not expressly indicate Congress's desire to model the D.C. provision after the federal provision, the similarity of language and the routine construction of D.C.'s local statutes in accord with their federal counterparts lend strong support to the view that the D.C. provision should be interpreted along the lines of the federal provision. It is well settled with respect to the federal provision that conspiracy to defraud encompasses both schemes to cheat the government out of money *and* schemes to obstruct lawful governmental functions. *See, e.g., Dennis v. United States*, 384 U.S. 855, 859-864 (1966); *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924).

Finally, Motlagh contends that Count 5 is void because it is multiplicitous with respect to Count 1. But it is

established that the government may simultaneously charge in one indictment, under similar federal and D.C. statutes, separate offenses that arise out of a single transaction. The only prohibition is that the defendant not be convicted and sentenced under both statutes. *See, e.g., United States v. Shepard*, 515 F.2d 1324, 1333-1336 (D.C. Cir. 1975). Here Motlagh has been convicted and sentenced on only one count.

CONCLUSION

Despite microscopic examination of the trial below by appellants' attorneys, no reversible error has been discovered. The central question raised by the district court's handling of the case stemmed from its decision to impanel two juries. Notwithstanding the attempt of appellant Lewis to show that the dual jury procedure specifically prejudiced his defense, the main complaint against the dual jury was its novelty. As appellant Motlagh stated, "[a]ny major departure from the traditional trial procedure runs the risk of injecting confusion and uncertainty into the proceedings." (Brief for appellant Motlagh at 44.) That the dual jury procedure increases these risks is beyond dispute. We do not believe, however, that the spectre of such risks should deter courts from implementing innovative, resource-saving procedures in carefully selected cases so long as these procedures are administered carefully and meet the requirements of due process. In this case these standards were met. We therefore affirm the convictions rendered below.